UNE-P have not converted residential customers to their own switches, even in locations such as New York where they already have deployed their own switches to serve business customers.[71] WorldCom and AT&T readily admit that they have no plans to convert their UNE-P customers to their own switches, even after they have acquired a large customer base.[72] Qwest's experience confirms this: Despite the fact that UNE-P demand in Qwest's in-region service area *increased* dramatically from December 2000 to December 2001 (growing from approximately 372,000 to more than 461,000), the total number of hot cuts ordered by CLECs has generally *decreased* in the past year and has been on the order of 4,000 to 6,000 hot cuts per month in recent months. Moreover, though AT&T claims that UNE-P customers can be migrated to CLEC switches efficiently using managed conversions,[73] Qwest is not aware of a single request by AT&T for such a managed conversion in Qwest's in-region service area. Ultimately, this experience demonstrates that the availability of UNE-P, far from providing a launching point for facilities-based competition as CLECs suggest, actually depresses facilities investment.

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[71] *UNE Fact Report 2002* II-17 to II-20 (Apr. 2002) (submitted by BellSouth, SBC, Qwest, and Verizon) (submitted as Attachment B to Qwest's initial comments) ("*UNE Fact Report*").

[72] WorldCom submitted testimony to the Commission stating that UNE-P "is the only service-delivery option that WorldCom currently views as even potentially viable." Declaration of Vijetha Huffman ¶ 5, *attached to* Comments of WorldCom, Inc., *Application of Verizon New Jersey, Inc. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 01-347 (filed Jan. 14, 2002). AT&T similarly has acknowledged to the Commission that "it has not pursued a strategy of converting platform customers to its own facilities 'to provide basic local residential service to customers anywhere in the country.'" *UNE Fact Report* at II-18, n.56 (quoting Supplemental Declaration of Michael Lieberman on Behalf of AT&T Corp. ¶ 20, *attached to* Ex Parte Letter of Peter Kiesler, Sidley Austin Brown & Wood (representing AT&T), to William F. Caton, CC Docket No. 01-324 (Feb. 8, 2002)).

[73] AT&T Comments at 221.

Professor Willig's attempt to demonstrate empirically that increased availability of UNE-P correlates with higher levels of facilities investment and competitive entry[74] is equally unavailing. As explained in the analysis by John Haring and his colleagues submitted with these comments, Professor Willig's study of ILEC investment suffers from several fundamental flaws.[75] Perhaps the most significant is that Professor Willig attempts to use 2001 variables (specifically, UNE-P prices and the number of CLECs competing in each state in 2001) to explain ILEC investment levels from five years *earlier*. In order to conclude that regulatory and market conditions in 2001 influenced decisions made as early as 1996, as Professor Willig does, one would have to believe that those responsible for ILEC investment decisions in 1996 knew the UNE-P prices that would be set and the number of CLECs that would be participating in the market in 2001.[76] But this is obviously absurd. Likewise, Professor Willig's use of the number of CLECs as a measure of the level of competition is misguided. "[A] few large CLECs could be far more consequential than many small ones," depending on factors such as the number of customers served by each CLEC and the capacity of each CLEC to serve additional customers with existing facilities and resources.[77] The use of such a poor measure of the level of competition further undermines the validity of his conclusions.

Dr. Haring and his colleagues were able to develop a more reliable model using alternative data sources that corrects for these flaws and disproves Professor Willig's conclusions concerning the relationship between UNE prices and ILEC investment. Their principal finding

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74/ *See id.*, Declaration of Robert D. Willig at 40-64.

75/ John Haring et al., *UNE Prices and Telecommunications Investment* 3-4 (July 17, 2002) (submitted as Attachment B to these comments) ("Haring et al.").

76/ *Id.* at 4-5.

77/ *Id.* at 5.

is that UNE loop price is positively correlated with ILEC investment — *i.e.*, as UNE loop prices increase, so does ILEC investment.[78/] They also discuss several models of CLEC entry that are far more reliable than Professor Willig's and do not support his conclusion that low UNE prices encourage CLEC entry. To the contrary, these studies have found that low UNE prices "do *not* promote competition, especially facilities-based competition."[79/]

Second, the CLECs' argument ignores the statutory test. What the CLECs are seeking is to continue indefinitely the unbundling requirements unless and until each individual CLEC decides it no longer has any use for them as a transitional mechanism to "develop a customer base." But if the Commission finds that CLECs are capable of self-provisioning a certain network element or obtaining a substitute for that element from non-ILEC sources, that ends the statutory inquiry with respect to that element. Any other result would strip away the limiting principles that the Supreme Court found to be embodied in the statute and eliminate the potential for increased facilities-based competition. Thus, to assert that the facility in question is needed as part of a transitional mechanism to obtain a customer base is simply to quarrel with the finding that CLECs are not impaired without access to the facility.

Third, the CLECs' assertion also ignores the availability of resale as a transitional mechanism to obtain a customer base. A CLEC that feels the need to obtain a "critical mass" of customers before investing in facilities can do so using resale. UNE-P adds no more "competition" than resale because, as noted above, true competition lies in the alternatives offered by *unshared* facilities, and UNE-P, by definition, involves only shared facilities. Although the Commission assigned "little weight" to the availability of resale in the context of

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78/ *Id.* at 12-13.

79/ *Id.* at 17.

determining whether to unbundle *individual* elements, it did so based on the concern that ILECs could then avoid many of their unbundling obligations merely by offering unbundled elements to end users as retail services.[80/] But that risk is entirely inapposite in the context of UNE-P: UNE-P is by definition already the functional equivalent of finished retail local phone service that Congress has *required* ILECs to provide for resale. As a result, leaving a network element such as circuit switching on the national list solely to permit CLECs to obtain UNE-P would provide no competitive benefits and would eviscerate the "necessary and impair" standard prescribed by Congress.

2. The Commission Should Not Use its Unbundling Rules to Protect Individual CLECs.

Several commenters advocate proposals that would have the effect of protecting individual CLECs and/or particular business models. Most notably, ALTS supports allowing individual carriers or classes of carriers to make particularized showings of impairment to justify targeted unbundling of additional network elements.[81/] Proposals to discount evidence of intermodal competition because such competition may not aid intramodal competitors similarly are based on the premise that the Act is designed to protect particular competitors or business models. But, as the D.C. Circuit recognized, that is not the case — the Act is designed to promote competition, not individual competitors that choose a particular entry strategy.

The impairment test cannot be based on whether a particular CLEC or business plan can succeed without access to a particular ILEC network element. As the Commission observed in the *UNE Remand Order*, "[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove

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80/ *UNE Remand Order*, 15 FCC Rcd at 3732 ¶ 67.

81/ ALTS Comments at 37-38. *See also* Z-Tel Comments at 24 (arguing that the Commission must "focus . . . on the needs of requesting carriers rather than on the level of competition for a particular service").

elements from the [national] list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers."[82/] Entertaining requests to *add* elements to the list for particular CLECs would have the same effect. The D.C. Circuit's decision makes clear that the goal of the Act is to protect and facilitate competition, not individual competitors or business plans.[83/] So long as there is a meaningful opportunity for competition to develop without providing CLECs with access to a particular ILEC network element, the fact that an individual CLEC may need access to that element to pursue its unique business plan does not justify a finding of impairment. Thus, ALTS' suggestion that the Commission should "permit individual showings of impairment [by CLECs] on a case-by-case basis"[84/] would be contrary to the goals of the Act, and would be extraordinarily impractical and inefficient. Indeed, this approach would be a recipe for perpetual unbundling requirements, since there will always be a particular new entrant or undercapitalized carrier that could claim it would be better off, at least in the short term, with access to UNEs. But that is not the statutory test.

E. Granularity of Unbundling Rules

A number of CLECs have argued that the Commission should not modify its existing analytical framework to make it more granular, and instead support maintaining the current

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82/ *UNE Remand Order*, 15 FCC Rcd at 3765 ¶ 150.

83/ This can be seen in the court's finding that the *Line Sharing Order* placed too much emphasis on the services that intramodal competitors sought to offer and failed to give adequate consideration to the presence of intermodal competition. The court explained that "nothing in the Act appears [to give] a license to the Commission to inflict on the economy the sort of costs [associated with unbundling] . . . under conditions where it had no reason to think doing so would bring on a *significant enhancement of competition*." *USTA*, 290 F.3d at 429 (emphasis added).

84/ ALTS Comments at 37.

national list of UNEs.[85] The D.C. Circuit has now firmly rejected this approach, recognizing that it results in making UNEs available in markets "where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[86] Consequently, in appropriate circumstances, more granular rules may be the logical outcome of an impairment analysis and/or necessary to further the goals of the Act. For example, a market-specific analysis may be necessary to eliminate unbundling obligations in certain markets where it would be feasible for CLECs to obtain network elements from a non-ILEC source, and a service-specific analysis may be required to prevent regulatory arbitrage. At the same time, it is appropriate to eliminate the unbundling requirement for a particular element on a national basis if in fact the Commission's analysis indicates that unbundling of that element is not needed in any market because, for example, it has been, or reasonably could be, ubiquitously deployed.

The uncertainty, complexity, and litigation that could be created by a more granular approach can and should be avoided by the adoption of objective, bright-line rules that can easily be applied and that provide predictability for all carriers.[87] For example, as discussed in more detail below, the increased deployment of CLEC transport facilities in certain markets justifies

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[85] *See, e.g.*, AT&T Comments at 97-100 (arguing that proposals for increased granularity are "exceptionally poor proxies for the factors that determine 'impairment' . . . for individual network elements."); Covad Comments at 79-81, 84-88 (arguing against more granular analysis); WorldCom Comments at 51 ("Continuing to apply the current standard . . . would lead to greater certainty and would minimize the likelihood of further appeals and challenges.).

[86] *USTA*, 290 F.3d at 422.

[87] On this point, CLECs, ILECs, and other commenters that support some form of granularity generally agree. *See, e.g.*, WorldCom Comments at 63 ("impairment analysis must yield bright-line unbundling rules" that remove uncertainty); Covad Comments at 84-85 (urging the Commission to make sure that its rules are clear); SBC Comments at 60, 63-65 (same); California PUC Comments at 14 (same).

geographic specificity in the unbundling analysis for the dedicated transport network element. But rather than creating an entirely new or subjective test to identify the markets in which CLECs have alternatives to ILECs' networks, the Commission should use the familiar and easy-to-administer pricing flexibility test.

F. Authority of States Under Federal or State Law

Although many commenters have urged the Commission to let the states assume significant responsibility for determining which UNEs should be unbundled,[88/] that approach is untenable on both legal and policy grounds. As discussed below, Congress assigned to the Commission, not the states, the task of "determining what network elements should be made available."[89/] To discharge that responsibility, the Commission must make finely tuned determinations about the circumstances in which it would — and *would not* — be appropriate to allow CLECs to share an ILEC's network facilities in lieu of obtaining facilities of their own. The ensuing UNE list sets both a ceiling and a floor. Viewing it only as a floor, and permitting the states to add UNEs to that list, either as a matter of federal or state law, would "substantially prevent implementation of the requirements of [section 251] and the purposes of [the Act]."[90/] That approach could be lawful only if Congress had decided as a general matter that "more unbundling is better" — but, as the D.C. Circuit recently confirmed, Congress decided no such

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88/ *See, e.g.* AT&T Comments at 241-51 (arguing that state commissions should have primary role in determining when UNEs can be "de-listed"); ALTS Comments at 129-32 (arguing that the Commission should continue to allow states to add to the national UNE list); California PUC Comments at 22-24 (same).

89/ 47 U.S.C. § 251(d)(2).

90/ *Id.* § 251(d)(3)(C).

thing.[91] As a result, preserving a substantial role for state discretion in this area would be inimical to the "national policy framework" created and contemplated by the 1996 Act.[92]

As an initial matter, the Commission should make clear that states cannot add unbundling requirements under either federal or state law for elements the Commission itself has considered but declined to unbundle. When the Commission properly executes its own role under section 251(d)(2), it does not merely create a minimum set of unbundling rights. It also necessarily makes a judgment about the extent to which *further* unbundling would distort the competitive marketplace by depriving ILECs and CLECs alike of appropriate investment incentives. Permitting the states to supplement the UNE list (but not subtract from it) would necessarily produce precisely the market distortion that the Commission's decision *declining* to require unbundling sought to avoid. Thus, for example, in declining to require unbundled packet switching in the *UNE Remand Order*, the Commission concluded that such a requirement would be contrary to "the Act's goal of encouraging facilities-based investment and innovation" and potentially "stifle burgeoning competition in the advanced service market."[93] A state-imposed requirement that packet switching nevertheless be unbundled accordingly would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and should be preempted.[94]

91/ *USTA*, 290 F.3d at 425.

92/ *See UNE Remand Order*, 15 FCC Rcd at 3751 ¶ 117. Qwest does *not* argue that the Commission lacks statutory authority to identify objective, fact-specific circumstances in which unbundling would or would not be appropriate and then delegate to the state commissions the task of determining whether those circumstances are present in particular markets.

93/ *Id.* at 3839-40 ¶¶ 314-317.

94/ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287 (1987). Even where a state law does not plainly contradict a federal law or regulation, preemption is routinely found when the state law or regulation would undermine the "flexibility" that is "a critical component

Contrary to the views of some commenters, section 251(d)(3) does not carve out a safe harbor for such market-distorting state-level regulation, because, by its terms, that provision excludes state action that would "substantially prevent implementation of the requirements of [section 251] and the purposes of [the Act]."[95] Indeed, the Commission recognized as much in the *UNE Remand Order* when it explained that section 251(d)(3) does not permit states to add additional unbundling obligations that do not "meet the requirements of section 251 *and the national policy framework instituted in this Order.*"[96] States nevertheless have attempted to impose unbundling requirements as a matter of state law for elements the Commission determined should not be unbundled.[97] To make clear that such actions are impermissible, the Commission should exercise its preemption authority to foreclose state unbundling requirements for any UNE that this Commission has specifically decided not to unbundle under its own analysis.

Moreover, the Commission cannot avoid its responsibility to determine the elements to be unbundled by purporting to delegate that task, in whole or in part, to the states. The statutory

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of the statutory and regulatory framework under which the [federal agency] pursues difficult (and often competing) objectives." *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 349 (2001); *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (holding that state policies resulting in "serious interference with the achievement of the full purposes and objectives of Congress" are preempted) (internal quotation marks omitted).

95/ 47 U.S.C. § 251(d)(3)(C).

96/ *UNE Remand Order* ¶ 154 (emphasis added).

97/ For example, the Minnesota state commission recently opened a new proceeding to determine whether Qwest should be required to provide unbundled packet switching, notwithstanding the Commission's determination in the *UNE Remand Order* that such unbundling should not be required. Notice and Order for Hearing, *In re Commission Review and Investigation of Qwest's Unbundled Network Element Prices* and *Investigation into Qwest's Obligation to Unbundle its Network to Permit Line Sharing Over Fiber-Fed Loops*, Docket Nos. P-421/CI-01-1375, P-421/CI-02-293, at 3-4 (Minn. Pub. Utils. Comm'n Mar. 13, 2002).

language itself precludes the Commission from avoiding its Congressionally mandated duties and delegating to state commissions substantial responsibility for interpreting, or making policy judgments concerning, the "necessary and impair" standard. Section 251 "requires" *the Commission* — not individual state commissions — to "determin[e] what network elements should be made available," by applying that standard and perhaps other factors that it deems relevant to the Act's overall purposes.[98/] An open-ended delegation to state commissions would amount to an abdication of the Commission's responsibility to provide "substance to the 'necessary' and 'impair' requirements" and would leave it to chance that state commissions will do so.[99/] Congress did not intend that result; to the contrary, as noted above, Congress preserved state authority to impose access and interconnection obligations *only to the extent* those obligations are "consistent with" and "do[] not substantially prevent implementation of the requirements" of section 251.[100/]

Where, as here, Congress has expressly defined the limits of permissible delegation, an agency may not delegate beyond those limits. The Act includes various specific provisions authorizing delegation of the Commission's authority to other entities, including state bodies, and these authorize such delegation only with respect to particular, discrete subjects. These include, for example, numbering administration,[101/] universal service,[102/] and jurisdictional

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98/ 47 U.S.C. §251(d)(2); *Iowa Utils. Bd.*, 525 U.S. at 391-92.

99/ *Iowa Utils. Bd.*, 525 U.S. at 392.

100/ 47 U.S.C. § 251(d)(3).

101/ *Id.* § 251(e)(1).

102/ *Id.* § 254(a)(1).

separations of property and expenses between intrastate and interstate operations.[103] Given the Act's express enumeration of such targeted subjects of delegation, the Act must be understood to prohibit broader delegation to the states by the Commission in unrelated areas that are not similarly identified.[104]

Indeed, the Commission itself has recognized, in analogous circumstances, that it may not simply relinquish its regulatory responsibilities to the states in the absence of express congressional authorization to do so. For example, in *MTS and WATS Market Structure*, the FCC rejected suggestions that it delegate to state commissions the authority to formulate interstate access charge regimes, noting that "[t]his Commission has the responsibility to balance conflicting goals to the Communications Act in order to achieve results that will promote all of those goals to the maximum extent possible . . . [and] [t]he Act does not permit us to abdicate that responsibility to others."[105] Similarly, in its ONA rules, the FCC declined to delegate review authority over interstate tariffs to state commissions and expressed doubt that such delegation is authorized by the Communications Act.[106]

Likewise, here, the Act does not permit the Commission to delegate to the states the responsibility for making the legal and policy judgments necessary to determine what elements

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[103] *Id.* § 410(c).

[104] *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947); *United States v. Giordano*, 416 U.S. 505, 514 (1974); *Halverson v. Slater*, 129 F.3d 180, 185-86 (D.C. Cir. 1997) (applying "expressio unius est exclusio alterius" canon, which holds that "the mention of one thing implies the exclusion of another thing," to invalidate subdelegation that exceeded specifically limited grant of delegation authority) (internal quotation marks omitted).

[105] 97 F.C.C.2d 682, 762 ¶ 202 (1983).

[106] Memorandum Opinion and Order on Reconsideration, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 8 FCC Rcd 3114, 3118 ¶ 23 (1993).

should be unbundled. Permitting state commissions to supplement or determine the list of UNEs on a state-by-state basis according to their own standards would produce uncertainty and inconsistent results, and would inhibit the development of competitive, de-regulated telecommunications markets.

Still more problematic is AT&T's bizarre proposal to allow state commissions to prevent the *Commission*, in effect, from *removing* an unbundling requirement from the existing list. AT&T urges the Commission to "establish a process in which state regulatory commissions *take the lead* in determining when alternatives in their states are sufficiently available to warrant 'de-listing' a UNE."[107/] As an initial matter, this proposal is a telling about-face from AT&T's position in the *UNE Remand* proceeding, where AT&T led the opposition to an increased state role. There AT&T declared: "Any process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress."[108/]

AT&T's new proposal would create precisely the mischief that it rightly feared in the *UNE Remand Proceeding*. In particular, it would thwart the "flexibility" that Congress specifically gave to this Commission to balance the statutory objectives. Worse still, just like the proposals to let the states add (but not subtract) UNEs from the national list, it would skew the inquiry in favor of non-facilities-based competition. AT&T's proposal would effectively impose on ILECs the burden of having to convince individual state commissions to de-list a UNE even

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[107/] AT&T Comments at 241 (emphasis added).

[108/] Reply Comments of AT&T Corp., CC Docket No. 96-98, at 57-58 (filed June 10, 1999).

after this Commission had determined that the element no longer satisfies the "necessary and impair" standard. This would all but prevent the Commission from removing UNEs from the national list "as alternative facilities become more available and the market for telecommunications in general grows more competitive."[109/] Stripped of unilateral authority to reduce regulatory obligations in response to developments in the marketplace and according to the standards set forth in the Act (and as required by the D.C. Circuit's decision), the Commission would have to rely on the willingness of individual state commissions, in effect, to ratify the Commission's decisions and findings. It is difficult to imagine a regulatory approach more at odds with the national policy framework created by Congress, and the D.C. Circuit's recent decision.

II. THE COMMISSION SHOULD REMOVE CIRCUIT SWITCHING AND, IN MANY MARKETS, DEDICATED TRANSPORT FROM THE LIST OF REQUIRED UNES.

A. Circuit Switching

The record establishes that CLECs would not be impaired from providing any telecommunications services in *any* geographic markets without access to unbundled switching.[110/] As Qwest demonstrated in its comments, CLECs have deployed and are using their own switching facilities throughout the country. CLECs currently are using their own switches to serve customers in wire centers serving 86% of the Bell companies' access lines.[111/] The commenters in this proceeding have provided no basis for concluding that CLECs could not

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109/ *Notice* at 22802 ¶ 45.

110/ Qwest focuses in this section on *circuit* switching. As noted below, the Commission generally declined to require the unbundling of packet switching in the *UNE Remand Order*, and subsequent developments have only strengthened the rationale for that decision.

111/ *UNE Fact Report* at II-1, II-6.

use these same facilities to expand their services to other customers (such as mass-market retail customers) in those wire centers or to customers in other wire centers where CLEC switches have not yet been deployed. Indeed, the opposite is true. The *UNE Fact Report* explains that switch manufacturers have employed modular designs that make it easier and more cost-effective to expand the capacity of their switches,[112] and CLECs themselves report that they are able to use a single switch to serve large geographic areas spanning a whole LATA, a whole state, or even multiple states.[113] Moreover, the fact that CLECs have been able to deploy their own switching facilities in so many wire centers demonstrates that, even in markets where CLEC switches have not yet been deployed, CLECs would be more than capable of self-provisioning switches instead of relying on ILEC switching.[114] Thus, there is no basis for concluding that CLECs would be impaired from providing telecommunications services in *any* markets without access to unbundled ILEC switching at TELRIC prices.

The CLECs' attempts to discount the significance of the substantial CLEC switch deployments are unpersuasive. They argue that new entrants require access to the UNE-P (and thus to unbundled switching) in order to develop a sufficient customer base to justify deploying a switch in a particular market.[115] AT&T similarly contends that, because utilization of CLEC

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[112] *UNE Fact Report* at II-9.

[113] *Id.* at II-8.

[114] *See* Farrell Declaration ¶ 17 ("[T]he fact that one or more alternative suppliers are providing an element is itself strong evidence that entry barriers do not preclude efficient competitors from supplying the element in question.").

[115] *See, e.g.*, WorldCom Comments at 26 ("[U]ntil it builds a substantial customer base, a CLEC using its own switches and transport cannot achieve all of the scale economies the ILEC enjoys."); *id.* at 85 (arguing that CLECs require "a sufficient concentration of [high-volume] customers to justify deployment of a CLEC switch"); AT&T Comments at 207-08 (arguing that UNE-P is necessary because it allows AT&T to acquire business customers through UNE-P and then migrate those customers to AT&T switches in large quantities); General Communication

switches allegedly is below "an efficient usage level, . . . AT&T cannot achieve the same efficiencies as the ILECs when it uses its own switches."[116/] In effect, this argument amounts to little more than claiming that CLECs' costs per customer would be too high if they had to deploy a switch before winning a critical mass of customers. But, as discussed above and in Professor Farrell's declaration, this argument is unpersuasive and rightfully was rejected by the D.C. Circuit. Professor Farrell's declaration provides references to the economics literature that "describes how innovative firms in many industries can and do survive a period of being below [even] minimum efficient scale."[117/] Thus, the court correctly concluded that, even though "average unit costs are necessarily higher at the outset for *any* new entrant into virtually any business,"[118/] such cost disparities alone do not justify a finding of impairment.

Even if the CLECs' argument were not squarely foreclosed by the D.C. Circuit's opinion, CLECs still have not established as a factual matter that they would be unable to accumulate the volumes they supposedly need to compete. Moreover, they fail to take into account the fact that CLECs can lease switching capacity to each other. In other words, even if AT&T is right that some CLECs' own traffic does not fully utilize the capacity of their switches, such CLECs can lease that excess capacity to others, much as CLECs argue in cost dockets around the country that ILEC costs would be reduced if they shared their facilities with other utilities. Indeed, the availability of excess CLEC switching capacity, if true, only demonstrates that CLECs have an

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Comments at 38 ("Without UNEs, [a CLEC] would have . . . to make a huge capital investment upfront to build facilities without any assurance that it would eventually get the customers to sustain that investment.").

116/ AT&T Comments at 207.

117/ *See* Farrell Declaration ¶ 11.

118/ *USTA*, 290 F.3d at 427.

existing, alternative source of switching other than ILEC UNEs that they can use to provide service.

Moreover, if the desire to acquire a large enough customer base *before* deploying a switch were enough to justify maintaining switching as a UNE, then under the CLECs' analysis, switching would have to remain a UNE perpetually, because it will always be possible to identify (or at least hypothesize) a new entrant that lacks a large enough customer base in a particular market to justify the immediate investment in new switching facilities. But even if a particular new entrant does not have a sufficient initial customer base to justify deploying a switch, that does not justify requiring ILECs to provide UNE-P or unbundled switching. As noted in Part II-C above and recognized by the D.C. Circuit, the goal of the 1996 Act is to protect *competition*, not particular competitors.

In any event, new entrants have at least three alternatives to the UNE-P that provide meaningful opportunities to enter new markets without having to deploy a switch. For example, if other CLECs have deployed switches in a market, a new entrant could use that CLEC's excess switching capacity and purchase a UNE loop and dedicated transport or special access from the ILEC to connect the customer to the CLEC switch.[119/] Alternatively, the new entrant could offer resold ILEC services until it has obtained enough customers to justify the expense of deploying its own switch. Or the new entrant could combine ILEC switching, available at *market* (rather than TELRIC) prices, with unbundled loops to provide service. In each case, the CLEC would have a meaningful opportunity to compete and provide service without having to rely on unbundled ILEC switching.

[119/] The new entrant also may be able to purchase dedicated transport from a third party if dedicated transport is no longer required to be unbundled in the relevant market or the CLEC does not wish to purchase transport from the ILEC.

Finally, as noted above, CLEC complaints about thin profit margins for mass-market services do not justify a finding of impairment with respect to switching or the UNE-P. If regulators want to stimulate competition for residential customers in certain markets, they should rebalance rates and remove the barriers to entry posed by existing rate structures.

1. Hot Cuts

Because they cannot credibly dispute the overwhelming evidence of the ready availability of switching from sources other than ILECs, AT&T and other CLECs fall back to the argument that "hot cuts" pose operational impediments sufficient to satisfy the impair standard. But CLECs ignore the evidence that hot cut performance has improved considerably in the more than two years since the *UNE Remand Order* to a level foreclosing any argument that hot cuts pose an operational or other barrier to competition through use of UNE loops. As demonstrated in the *UNE Fact Report*, hot-cuts are now routinely completed on-time without significant disruptions more than 98% of the time.[120/] In particular, in each month since July of 2001, Qwest has performed at least 98% of its analog loop hot-cuts on time and at least 96% of its digital loop hot-cuts on time. Qwest also has studied the potential impact of increased hot-cut demand and determined that Qwest would be able to perform hot cuts in place of *all* incoming, mass market UNE-P orders to serve existing customers without any performance degradation. The CLECs have not provided any data demonstrating that problems with the hot-cut process impair their ability to serve customers using UNE loops with their own switches. And contrary to AT&T's claims, its purported preference for "managed" UNE loop conversions over individual hot cuts does not warrant a finding of impairment for switching.[121/] If AT&T desires managed

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120/ *UNE Fact Report* at II-16 to II-17, App. H.

121/ AT&T Comments at 221. Qwest is not aware of AT&T requesting any such managed conversions in its in-region service area.

conversion, it may resell ILEC services for the brief period prior to the connection of the loop to AT&T's switch as part of a managed conversion.

The Commission should reject the proposal of several commenters to condition any removal of unbundled switching from the list of required UNEs on the ILECs' implementation of some kind of automated process for provisioning UNE loops.[122/] As a preliminary matter, the development of a practicable automated process for provisioning loops is not within the control of the ILECs. The development of such a process would require the cooperation of ILECs, CLECs, and equipment vendors. Indeed, Telcordia has been soliciting funding from "all industry stakeholders" to develop industry standards (called "GR-303 Generic Requirements") and solve the security and other operational barriers that would permit automated local loop unbundling, although the process has been slow.[123/] Even after the necessary standards are developed, equipment manufacturers (whose recent financial difficulties have been well-documented) will have to invest the resources necessary to add this functionality to their products. More fundamentally, the data in the record demonstrate that the hot cut processes in use today are more than sufficient to warrant a finding that CLECs would not be impaired without forced access to unbundled switching.

Finally, there is no reason to believe that eliminating the requirement to provide unbundled switching would require carriers instantaneously to migrate all current UNE-P customers to CLEC switches using hot cuts, as some parties apparently fear. As noted above, CLECs serving those customers would have at least two options for continuing to provide

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122/ *See, e.g., id.* at 235-39; WorldCom Comments at 86.

123/ Telcordia Technologies, *GR-303 Integrated Access Platforms - 2001 Work Program Information* (visited July 17, 2002) <http://www.telcordia.com/resources/genericreq/gr303/program.html>.

service to their UNE-P customers for a transitional (or longer) period without requiring a hot-cut: ILEC switching obtained at market (rather than TELRIC) rates in combination with unbundled loops, or resold ILEC services. Either of these options would allow CLECs either to avoid hot cuts entirely or to migrate their UNE-P customers to CLEC switches at a more gradual pace.

2. Delays in Deployment

Contrary to the arguments made by some commenters, the possibility that CLECs may experience delays when deploying a switch does not justify a finding of impairment. The D.C. Circuit's ruling concerning cost disparities provides instructive guidance in this regard. Specifically, the court held that "to rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions."[124/] The same should be true of delays associated with constructing new facilities: new entrants in *any* industry must allow for a certain amount of planning lead time and construction time before new facilities become operational, just as new entrants in *any* industry face increased average costs until they achieve a certain scale of operations. The delays associated with deploying new switches could hardly be called an impairment, as evidenced by the approximately 1,300 known CLEC switches currently in service.[125/] Moreover, a finding of impairment based on the time it takes to deploy a new switch would almost certainly lead to a perpetual obligation to unbundle switching, and perhaps every other network element, as one could always identify (or hypothesize) a new entrant that does not yet have its own facilities in service.

124/ *USTA*, 290 F.3d at 427.

125/ *UNE Fact Report* at II-1.

B. Dedicated Transport

1. CLECs Are Not Impaired Without Access to Unbundled Transport in Markets That Satisfy the Commission's Pricing Flexibility Standard.

Qwest has proposed removing the requirement to unbundle dedicated transport facilities in markets that meet the Commission's test for pricing flexibility.[126/] This proposal is consistent with the D.C. Circuit's mandate to eliminate unbundling requirements "where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[127/] As the Commission noted in granting Qwest's recent application for pricing flexibility in 31 MSAs, the Commission's pricing flexibility rules are designed to give price cap LECs flexibility "as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives."[128/] Under the Commission's rules, a LEC seeking Phase I relief must meet triggers designed to "show that competitors have made irreversible investments in the facilities needed to provide the services at issue, thus discouraging incumbent LECs from successfully pursuing exclusionary strategies."[129/] The fact that

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126/ If the Commission eliminates the obligation to unbundle switching under section 251, the obligation to provide *shared* transport as a UNE should be eliminated as well since shared transport is relevant only to the extent that CLECs are obtaining unbundled switching from an ILEC. *See UNE Remand Order* at 3862 ¶ 369 n.731.

127/ *USTA*, 290 F.3d at 422.

128/ Memorandum Opinion and Order, *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 02-01, DA 02-952, ¶ 3 (rel. Apr. 24, 2002) ("*Qwest Pricing Flexibility*").

129/ Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, 14258 ¶ 69 (1999) ("*Pricing Flexibility Order*"). An ILEC seeking broader Phase II relief must meet even more stringent triggers designed to "demonstrate that competitors have established a significant market presence in the provision of the services at

competitors have made those irreversible investments demonstrates their belief that they can achieve a scale of operations sufficient to compete with ILECs in those markets. Their investments also demonstrate that they are not impaired by any lead time associated with the need to construct new facilities. Thus, in markets that satisfy the Commission's pricing flexibility test, CLECs clearly, by any standard, would not be impaired without access to unbundled transport from the ILEC.

Commenters' speculation about the existence of various barriers to entry in provisioning transport facilities from non-ILEC sources is unpersuasive, particularly in markets that have met the pricing flexibility test. For example, AT&T argues that "the high fixed costs and low marginal costs of local transmission facilities create huge economies of scale for the incumbents that CLECs can rarely expect to achieve."[130/] But if such economies of scale were as significant as AT&T alleges, one would expect competitive transport to be rare. But, as demonstrated in the *UNE Fact Report*, that is not the case, particularly in metropolitan areas and other areas that meet the Commission's Phase I pricing standard. Competitive transport providers have been building their fiber optic networks since 1985, and these networks continue to grow at very high rates.[131/] Moreover, CLECs in Qwest's in-region service area have extended their transport networks to

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issue." Where that is the case, "the availability of alternative providers will ensure that rates are just and reasonable." *Id.*; *see also Qwest Pricing Flexibility* ¶ 7 (Phase II triggers are "designed to demonstrate that competition for the services at issue within the MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period.").

130/ AT&T Comments at 128.

131/ Total route miles for CLEC fiber networks have nearly doubled since the *UNE Remand Order*, increasing from 100,000 to 184,000 during that period. *See UNE Fact Report* at III-6.

obtain fiber-based collocation in wire centers serving 60% of the lines in the 25 largest MSAs and in 86% of the wire centers that serve at least 20,000 business lines.[132/]

In particular, in markets that meet the Commission's Phase I pricing flexibility standard, competitive access providers are prevalent enough to justify the conclusion that efforts by an ILEC to exclude competitors "are unlikely to succeed."[133/] Where such market conditions exist, competitors clearly have been able to achieve whatever alleged scale economies that AT&T and other commenters have identified. Indeed, such investment by competitive access providers conclusively demonstrates that the cost characteristics of unbundled transport do, in fact, "render it [suitable] for competitive supply."[134/] And where that is the case, the D.C. Circuit has made clear that the Commission is not justified in imposing unbundling obligations.

The same is true of other alleged impairments identified by various commenters, such as collocation costs, difficulties obtaining access to rights of way, and customer concerns about service disruptions.[135/] ALTS, for example, argues that "[w]ithout the availability of alternative interoffice transport to *each* ILEC central office where CLECs provide service using unbundled local loops, CLECs have no practical access to these loops" and thus are "unable to provide service to the vast majority of telephone customers."[136/] This argument glosses over the various alternatives available to CLECs in markets that meet the Commission's Phase I pricing

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132/ *UNE Fact Report* at III-3.

133/ *See Pricing Flexibility Order*, 14 FCC Rcd at 14262 ¶ 77.

134/ *USTA*, 290 F.3d at 427.

135/ *See, e.g.*, AT&T Comments at 127, 130, 142-43, 145 (claiming that factors such as collocation costs, right-of-way issues, and potential customer disruptions impair deployment of CLEC transport facilities); *see also* WorldCom Comments at 77 (claiming that it is feasible to deploy competitive transport facilities only on short routes with high traffic density).

136/ ALTS Comments at 67.

flexibility test, particularly where the ILEC offers single point of interconnection as Qwest does in all LATAs in its in-region service area. In those markets, CLECs that choose not to provide their own transport to each central office in which they need access to UNE loops can purchase transport from either existing competitive access providers or the ILEC. Even if they purchase transport from the ILEC, they can do so at market prices that are disciplined by the existence of facilities-based competition (since, under Qwest's proposal, dedicated transport would be removed from the UNE list only in competitive transport markets that meet the FCC's pricing flexibility test).

The CLECs' argument concerning the need to aggregate sufficient levels of traffic to justify the investment in transport facilities[137/] does not merit requiring ILECs to unbundle transport facilities in markets that meet the Phase I pricing flexibility standard. This argument, in theory, is true of *any* investment that *any* business considers making, and it is no different from the same argument the CLECs raise with respect to switching, for example. All businesses considering an investment must decide whether expected demand for a product or service justifies the investment needed to provide that product or service, and investments in transport facilities are no different. In markets where competitors *already* have decided to deploy their own facilities, objective marketplace data demonstrates that these competitors clearly have concluded that it is possible to aggregate enough traffic to justify their investment. Indeed, they have overcome all of the other alleged impairments identified by commenters in this proceeding. Thus, in these markets, there is no reason to think that "the cost characteristics of [transport facilities] render it at all unsuitable for competitive supply."[138/] And if a particular CLEC does

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137/ *See, e.g.*, AT&T Comments at 126; WorldCom Comments at 77.

138/ *USTA*, 290 F.3d at 427; *see also* Farrell Declaration ¶ 29.

not yet generate enough traffic to justify deploying its own transport facilities, the CLEC always has the option of (a) purchasing transport from a third party until the CLEC has aggregated enough traffic to justify deploying its own transport facilities, or (b) obtaining special access services from the ILEC at rates that the Commission has found to be subject to competitive pressures. That the CLEC is not immune from having to make such an elementary business decision with respect to transport facilities cannot be sufficient to justify a finding of impairment.

2. The Commission Should Not Require ILECs to Provide Unbundled Multiplexing.

Multiplexing allows several lower-capacity circuits to be aggregated onto a higher-capacity circuit (*e.g.*, grouping multiple DS1 circuits onto a DS3 circuit) and later separated back into the lower-capacity circuits (called "demultiplexing"). Contrary to WorldCom's contention,[139/] CLECs would not be impaired without access to unbundled multiplexing as a standalone UNE. The equipment used to provide multiplexing functionality is neither particularly expensive nor characterized by any measurable economies of scale. For example, a CLEC's total installed cost for a DS1-to-DS3 multiplexer ranges from approximately $3,800 (equipped to serve 16 DS1s) to $4,200 (equipped to serve the maximum of 24 DS1s). When comparing this cost to Qwest's current tariffed rates for multiplexing, a CLEC that needs 13 DS1 dedicated transport circuits on a particular route[140/] would recover the cost of purchasing its own multiplexer in less than 15 months. For a CLEC that requires a multiplexer equipped to serve the maximum of 24 DS1s, the break-even point would arrive in little more than half that time. CLECs that nevertheless choose not to self-provision multiplexing equipment would still be able

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139/ *See* WorldCom Comments at 78-79.

140/ At Qwest's current tariffed rates for transport service, 13 DS1s is the point at which it is more cost effective to purchase a single DS3 transport circuit instead of individual DS1s.

to purchase multiplexing from Qwest at tariffed rates, and CLECs can access this service easily from their existing collocation cages.

III. THE COMMISSION SHOULD REJECT CLEC ATTEMPTS TO EXPAND UNBUNDLING REQUIREMENTS.

A. Advanced Services Facilities

The Commission should reaffirm that ILECs are not required to provide unbundled access to advanced services facilities such as packet switches and DSLAMs, not reinstate the line sharing requirement, and make clear that no additional unbundling requirements will be imposed on facilities used to provide advanced services. Three years ago, the Commission found that marketplace conditions support the conclusion "that requesting carriers have been able to secure the necessary inputs to provide advanced services to end users in accordance with their business plans," and that "carriers are deploying advanced services to the business[, residential, and small business] market[s]."[141/] Marketplace evidence supports that conclusion even more strongly today.

1. Significant Intermodal Competition for Advanced Services Mandates that Unbundling Requirements Not Be Imposed for Facilities Used to Provide Such Services.

The D.C. Circuit's decision concerning the *Line Sharing Order* makes clear that any analysis of unbundling advanced services facilities must begin with an analysis of the fierce intermodal competition that exists with respect to the provision of such broadband services. As that court recognized, the Commission has "repeatedly confirm[ed] both the robust competition, and the dominance of cable, in the broadband market."[142/] Indeed, the competition is so

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141/ *UNE Remand Order*, 15 FCC Rcd at 3835 ¶ 307.

142/ *USTA*, 290 F.3d at 428 (citing *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

significant in this market that, as Qwest has explained in the *Dominant/Nondominant Proceeding*, the only plausible conclusion is that LEC DSL services should be regulated as non-dominant.[143/]

For example, in Qwest's in-region service area, cable operators control 63% of the mass-market customers for broadband services, while Qwest serves approximately 26% of the same market.[144/] Nationally, the story is quite similar. Estimates of the number of cable modem subscribers range from 5.6 million to 7 million;[145/] by comparison, the same sources estimate that there are approximately 3 million DSL subscribers,[146/] representing a market share of less than

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Telecommunications Act of 1996, 14 FCC Rcd 2398, 2404 ¶ 12 (1999); *Third Report Pursuant to § 706*, 2001 WL 186930, ¶¶ 44, 48 (Feb. 6, 2002)).

143/ *See* Qwest Comments, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, at 36-55 (filed Mar. 1, 2002) ("*Qwest Dominant/Nondominant Comments*"). A non-dominant provider is one that lacks market power in the provision of the relevant service. *See* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Service Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, 15762 ¶¶ 6-7 (1997). Market share and elasticity of supply are among the four factors to which the Commission typically looks in determining market power. *See, e.g.*, Order, *Motion of AT&T Corp. to be Reclassified as Non-Dominant Carrier*, 11 FCC Rcd 3271, 3293 ¶ 38 (1995); Order and Notice of Proposed Rulemaking, *COMSAT Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, 14118 ¶ 67 (1998).

144/ *Qwest Dominant/Nondominant Comments* at 38.

145/ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, 1265 ¶ 44 (2002) (estimating 5.6 million cable modem subscribers) ("*Eighth Report*"); Julia Angwing, *E-Business: Bells Make a High-Speed Retreat from Broadband*, Wall St. J., Oct. 29, 2001, at B6 (estimating 7 million cable modem subscribers). The article also estimated that approximately 300,000 subscribers are receiving broadband service via satellite and 60,000 by fixed wireless technology.

146/ *See Eighth Report* ¶ 44 (estimating 3 million DSL subscribers); Angwing, *supra* note 145, at B6.

35%.[147] Cable modem service also has grown at a faster pace (45% in the first half of 2001) than DSL service has (36% during that period).[148] And as explained in the *UNE Fact Report*, because cable plant is easier to upgrade than telephone plant and can be upgraded at lower costs, "most analysts expect cable to maintain [this] considerable lead over DSL and other broadband technologies for the foreseeable future."[149]

Congress has declared in the context of cable service that even *one* partially built-out intramodal competitor is sufficient to create "effective competition."[150] Against that background, it plainly would be reasonable for the Commission to conclude that a similar standard should apply to determine the existence of effective competition in telecommunications. Of course, under that standard, the broadband market must be considered significantly competitive and open, given the competition offered by several players, all of which are able to serve similar customer groups.[151] As Qwest explained in the *ILEC Broadband* proceeding, mass-market and business customers of broadband services are more than willing to switch to a lower-cost provider, and competitors such as cable operators (for mass-market services) and IXCs (for business services) are more than capable of absorbing large numbers of ILEC

147/ Third Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, FCC 02-33, App. C, Table 4 (rel. Feb. 6, 2002).

148/ FCC Releases Report on the Availability of High Speed and Advanced Telecommunications Capability, FCC News Release, at 2 (Feb. 2, 2002).

149/ *UNE Fact Report* at IV-19.

150/ *See* 47 U.S.C. § 543(l)(1)(B)(ii) (a 15% market share by a multichannel video programming distributor other than the largest such distributor in a market qualifies as "effective competition"); *see also supra* notes 60-61 and accompanying text.

151/ Qwest Comments, CC Docket No. 01-337 (filed March 1, 2002) ("Qwest Broadband Comments").

customers in very short order.[152] These conditions ensure that ILECs will continue to face significant competitive pressures, and therefore that customers will continue to enjoy the benefits of competition, in the broadband markets without imposition of unbundling requirements.[153]

Indeed, this evidence demonstrates how absurd it is for CLECs to claim that ILECs' DSL facilities should be unbundled. Without even considering satellite and wireline-based broadband services, it is clear that, with *no* access to ILEC facilities, cable broadband service has not just exploded, but significantly outrun ILEC DSL services. And, as explained by the D.C. Circuit, where vigorous competition *already exists*, there simply is no basis "to inflict on the economy the sort of costs" associated with forced access because there is "no reason to think doing so would bring on a significant enhancement of competition."[154] The D.C. Circuit's reasoning thus compels the conclusion that the Commission should not require ILECs to make advanced services facilities available on an unbundled basis.

Requiring forced access to facilities used to provide advanced services also would be inconsistent with Congress's and the Commission's goal of stimulating broadband investment and deployment. As Qwest noted in its initial comments, cable operators already enjoy several regulatory advantages over ILECs. Imposing unbundling requirements on ILECs but not on their

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[152] Qwest Broadband Comments at 40-42, 44-45.

[153] WorldCom's allegation of widespread DSL rate increases following the collapse of the so-called data LECs is misleading in the first instance, but in any event does not undermine the obvious vitality of intermodal broadband competition. First, despite WorldCom's claims that DSL prices increased by 25% in 2001, Qwest's $2 per month increase (from $29.95 to $31.95) was nowhere near that significant. Moreover, that increase has allowed Qwest to recover the cost of deploying more than 1,400 remote terminals in 2001 to increase the availability of DSL service. In any event, Qwest's $31.95 rate remains well below the $40 rate initially offered by Qwest when it introduced its retail DSL service in 1998, demonstrating that in fact broadband competition *is* exerting price pressures on DSL services.

[154] *USTA*, 290 F.3d at 429.

cable competitors would place ILECs at an even greater disadvantage in the burgeoning advanced services markets and discourage further ILEC investment in new facilities. Moreover, as Qwest noted in the *ILEC Broadband* proceeding, "[s]uch asymmetrical distinctions" are contrary to "the Act's pro-competitive, deregulatory orientation, particularly for broadband."[155/]

AT&T is wrong in arguing unbundling is somehow necessary to *spur* ILEC investment in DSL facilities because, it claims, ILECs would otherwise refuse to undertake DSL investment and deployment to avoid "cannibaliz[ing]" their "more profitable narrowband access lines."[156/] AT&T ignores the fact that customers use second lines for a variety of purposes, such as for fax or for a second voice line, so greater use of DSL will often not result in cancellation of second lines. Contrary to AT&T's claim, moreover, narrowband access lines are typically not "more profitable" than DSL service: As noted above, ILECs are required to provide switched service at below-cost rates in many areas (particularly to residential subscribers). And even where ILEC rates for additional lines allow for some profit, those profits often are eroded to the extent that ILECs are forced to pay reciprocal compensation to CLECs for calls to ISPs. Finally, and most fundamentally, the ILECs' choice is not to invest in DSL facilities or leave customers with no choice but to use second lines; rather the choice is to invest in DSL facilities or lose customers interested in high speed Internet access to dominant cable modem and other competitors. Thus, it is hardly surprising that AT&T's argument is belied by WorldCom's comments in the *Broadband* proceeding, in which WorldCom conceded that ILEC investment in advanced

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155/ Qwest Broadband Comments at 56.

156/ AT&T Comments at 73.

services facilities has been "spurred by cable and data CLEC deployment."[157] Thus, Professor Farrell explains:

> [C]able-modem competition probably improves the ILEC's incentive to deal *voluntarily* with a DLEC who can more efficiently provide part of the DSL value chain, since the ILEC may well have an incentive to unbundle facilities to a DLEC at a market price and thereby capture some of the revenues from a high speed access customer rather than losing all of those revenues to the cable-modem provider.[158]

Qwest addresses below some of the CLEC proposals regarding facilities used to provide advanced services. Because most commenters have not directly proposed requiring ILECs to unbundle packet switching facilities,[159] Qwest focuses on proposals related to line sharing, DSLAMs, and DLC loops.

2. The Commission Should Not Reinstate Line Sharing Obligations or Expand Those Obligations to Fiber Loops.

In the *Line Sharing Order*, the Commission concluded that competitors would be impaired without unbundled access to the high frequency portion of copper loops, defined as the "frequency range above the voiceband on a copper loop facility used [by the ILEC] to carry analog circuit-switched voiceband transmissions."[160] In reaching this conclusion, the

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157/ Joint Reply Comments of WorldCom et al., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket 02-33, at 25-26 (filed July 1, 2002).

158/ Farrell Declaration ¶ 19 n.12.

159/ Qwest does discuss below the unfounded proposal by some commenters that the Commission require access to a form of unbundled packet switching in conjunction with the so-called "unified loop." Though Supra Telecommunications & Information Systems, Inc. asks the Commission to "establish[] new UNE rules for Packet switching" and other advanced services facilities, Supra presents no evidence that CLECs would be impaired without access to unbundled packet switching. Supra Comments at 14-15; *id.* at 18.

160/ Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications*